Supreme Court of the United States

No. 77-845

POTOMAC EDISON COMPANY,
Petitioner,
v.
PUBLIC SERVICE COMMISSION OF WEST VIRGINIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

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The petitioner, Potomac Edison Company, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Supreme Court of Appeals of the State of West Virginia entered in this proceeding on September 12, 1977.

OPINION BELOW

The opinion of the Supreme Court of Appeals of West Virginia and the opinion of the Public Service Commission of West Virginia (both opinions are unreported) appear in the Appendix hereto.

JURISDICTION

The judgment of the Supreme Court of Appeals of the State of West Virginia was entered on September 12, 1977. This petition for *certiorari* was filed within ninety days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1257(2) and (3).

QUESTIONS PRESENTED

1. Whether rates imposed on petitioner by the West Virginia Public Service Commission (in a decision which the West Virginia Supreme Court of Appeals declined to review) which will make it impossible for petitioner to maintain its credit and attract capital and may legally prohibit petitioner from issuing any further first mortgage bonds or further preferred stock, constitutes an unconstitutional taking of petitioner's property without due process of law, particularly when such rates were based upon an obvious error of law on the part of the Commission, namely the mistaken view that the coverage requirements contained in petitioner's controlling corporate documents were not binding.

2. Whether West Virginia Code, Chapter 24, Article 5, Section 1, which provides for discretionary review only of orders of the West Virginia Public Service Commission, including orders fixing rates for utility services, denies due process of law to utilities subject to the jurisdiction of the West Virginia Public Service Commission and particularly this petitioner.

STATUTORY PROVISION INVOLVED

West Virginia Code, Chapter 24, Article 5, Section 1:

§ 24-5-1. Review of final orders of commission.

> Any party feeling aggrieved by the entry of final order by the commission, affecting him or it, may present a petition in writing to the Supreme Court of Appeals, or to a judge thereof in vacation, within thirty days after the entry of such order, praying for the suspension of such final order. The applicant shall deliver a copy of such petition to the secretary of the commission before presenting the same to the court or the judge. The court or judge shall fix a time for the hearing on the application, but such hearing, unless by agreement of the parties, shall not be held sooner than

five days after its presentation; and notice of the time and place of such hearing shall be forthwith delivered to the secretary of the commission, so that the commission may be represented at such hearing by one or more of its members or by counsel. If the court or the judge after such hearing be of the opinion that a suspending order should issue, the court or the judge may require bond, upon such conditions and in such penalty, and impose such terms and conditions upon the petitioner, as are just and reasonable. For such hearing the commission shall file with the clerks of said court all papers, documents, evidence and records or certified copies thereof as were before the commission at the hearing or investigation resulting in the entry of the order from which the petitioner appeals. The commission shall file with the court before the day fixed for the final hearing a written statement of its reasons for entry of such order, and after arguments by counsel the court shall decide the matter in controversy as may seem to be just and right.

STATEMENT OF THE CASE

On June 30, 1975, Potomac Edison Company (hereinafter "Potomac") filed with the West Virginia Public Service Commission (hereinafter "Commission") its tariff designated P.S.C. W. Va. No. 1, stating increased rates and charges for furnishing electric service in the territory served by it in West Virginia, the new tariff to become effective July 30, 1975.

The test year upon which the filing was based was the calendar year 1974. Additional revenues of $3,116,704 annually were reflected in the proposed rates and supported in the filing.

By order dated July 8, 1975, in accordance with West Virginia regulatory practice, the Commission made Potomac respondent to the proceeding, suspended the new tariff and use of the rates and charges proposed therein

until November 26, 1975, and conditioned the subsequent use of those increased rates and charges upon the filing by Potomac of a bond in the amount of $4,500,000, to secure any eventual refund.

Potomac filed the required $4,500,000 bond in this case and the increased rates, amended to reflect the rolled-in amount of the reasonable level of fossil fuel costs pursuant to the Commission's orders in other cases, not relevant here, were permitted to go into effect under bond on November 26, 1975.

By its May 20, 1976 order, the Commission established notice requirements and set this proceeding for hearing. Required notice was thereafter given; and the proceeding came on for hearings before the Commission in Charleston on August 23, and September 7, 8, and 9, 1976; and in Martinsburg on August 23 and 24, 1976.

The Commission's decision was rendered on April 5, 1977, almost two years after the filing and more than twenty-six months after the test year. The Commission allowed increased rates and charges over previous rates and charges in the amount of only $2,114,632. The record shows that by so doing it deprived Potomac of any reasonable prospect of financing its essential construction program.

A Petition For Rehearing, Reargument, and Reconsideration was filed by Potomac on April 15, 1977 which, among other things, specifically showed that under then-existing circumstances Potomac could not, unless additional rate increases were allowed, maintain its credit and attract capital on a reasonable basis and in all probability could not finance the construction of facilities (commitments for which must be made in 1977 and 1978) necessary to meet the needs of its customers for electric service in the 1980's. The Commission's order denying rehearing,

entered on April 25, 1977, ignored the record which, among other things, showed construction programs totaling $460,000,000 for the years 1976 through 1980 and a lack of revenues to support the financing thereof. Five days before, on April 20, 1977, the Commission denied a parallel application for rehearing filed by Monongahela Power Company, a corporate affiliate of petitioner, on the ground that it had a subsequently-filed rate case pending. In a petition for *certiorari* filed concurrently herewith, Monongahela Power Company argues that such fact is an obviously unlawful basis for the denial of rate relief. Whatever the validity of that argument (with which we concur), Potomac has no such subsequent case and the Commission may not even attempt to seek refuge in that argument here.

On May 24, 1977, Potomac filed a petition for appeal of said rate orders to the Supreme Court of Appeals of West Virginia pursuant to the West Virginia Code, Chapter 24, Article 5, Section 1. Briefs were filed, including supplemental briefs expressly requested by the Supreme Court of Appeals on the question of Potomac's ability to maintain its credit and to attract capital. Oral argument was held before the Supreme Court of Appeals on July 12, 1977. By order of September 12, 1977, the Supreme Court of Appeals denied Potomac's petition for appeal, i.e., declined to accept the case for hearing on the merits. See Appendix C, hereto.

The West Virginia Public Service Commission declined to stay its order pending review and the West Virginia Supreme Court of Appeals also declined to grant a stay. This had the effect of requiring Potomac to refund more than $10,000,000, including interest, to its West Virginia customers at the very time it was seeking judicial review.

REASONS FOR GRANTING THE WRIT

1. The decision below raises a question of extreme significance to all utilities.

The basic question presented by this appeal is one of simple economics. The record shows, and no one disputes, that Potomac Edison Company is engaged in a continuing program of constructing facilities, including electric generating facilities. There is no dispute that such facilities are and will be required for the rendition of reliable electric service to the Company's customers in West Virginia and elsewhere. The record shows that Potomac's internal generation of funds for construction is only about half of the amounts required. It is, therefore, similarly not disputed that the Company must engage, almost continuously, in raising significant amounts of capital to finance this construction program.

This Court has clearly held that a public utility is entitled to a return which will enable it to maintain its financial integrity and carry out its public service functions. In *Bluefield Waterworks and Improvement Company* v. *Public Service Commission*, 262 U. S. 679, 692-693 (1923), this Court said:

> "A public utility is entitled to such rates as will permit it to earn a return on the value of the property which it employs for the convenience of the public equal to that generally being made at the same time and in the same general parts of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties; but it has no constitutional right to profits such as are realized or anticipated in highly profitable enterprises or speculative ventures. The return should be reasonably sufficient to assure confidence in the financial soundness of the utility and should be adequate, under efficient and economical management, *to maintain and support its credit and enable it to raise the money necessary for*

the proper discharge of its public duties." (Emphasis supplied.)

In *Federal Power Commission* v. *Hope Natural Gas Company*, 320 U. S. 591, 603 (1944), this Court again set the same standard, saying:

> "From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business. These include service on the debt and dividends on the stock. ° ° ° By that standard the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks. *That return, moreover, should be sufficient to assure in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.*" (Court's citations omitted.) (Emphasis supplied.)

The order of the West Virginia Public Service Commission here involved fails to meet this standard on its face. It set a level of rates so low that the Company's coverages° can be shown to be insufficient to permit the issuance of first mortgage bonds and preferred stock. This result is directly contrary to this Court's holdings in the *Bluefield* and *Hope* cases, and arises from an obvious error on the part of the West Virginia Public Service Commission which, in arguing that the Supreme Court of Appeals should not accept this case for review, asserted that the coverage requirements in question are not "a law or regulation, or . . . requirement," but simply a "rule of thumb." *This is simply not true.* The record is clear that Potomac's credit standing and ability to attract capital, as well as its legal rights under the governing corporate documents (which are also embodied in federal regulations) squarely

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°The Company's earnings (as defined in its indenture) must be two times interest charges on existing and proposed first mortgage bonds or the proposed bonds cannot be issued. The requirement for issuance of preferred stock is one and one-half times.

depend upon what the Commission has erroneously passed over as a "rule of thumb." The fact that the West Virginia Public Service Commission could make this assertion demonstrates the essential error in this case and makes even more unlawful the refusal of the West Virginia Supreme Court of Appeals to review it.

Potomac Edison Company is a part of the Allegheny Power System and hence subject to regulation by the Securities and Exchange Commission (hereinafter, the "SEC") pursuant to the Holding Company Act of 1935, 15 U. S. C., § 79 *et seq.* Under that Act, Potomac is prohibited from issuing or selling any security except in accordance with a "declaration" under 15 U. S. C., § 79(g). See 15 U. S. C., § 79(f).

Pursuant to 15 U. S. C., § 79(g), the SEC has issued regulations which, in effect, specify the kinds of transactions which the SEC will approve. The question of coverage with respect to first mortgage bonds is dealt with in the SEC's Statement of Policy Regarding First Mortgage Bonds Subject to the Public Utility Holding Company Act of 1935, Release No. 35-13105, February 16, 1956, 21 F. R. 1286. On the same date, the Commission issued its Statement of Policy Regarding Preferred Stock Subject to the Public Utility Holding Company Act of 1935, Release No. 35-13106, 21 F. R. 1288.* The full text of these releases, as reported in 3 CCH Federal Securities Law Reporter, beginning at ¶¶ 36,675 and 36,691, respectively, is attached hereto as Appendix D.

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*The requirements imposed by these Statements of Policy were already to be found in the indentures and charters of most utilities and were, therefore, binding on the companies as a matter of corporate law. In a sense, the Commission's Statements simply reflected the facts of life in the financial market.

These Statements *require* the Indenture and charter provisions already described. The basic principle of the Statement of Policy Regarding First Mortgage Bonds is set out in Regulation § 251.13105, which, in provisions relative to coverage, requiring what has been referred to as "two times coverage," reads as follows:

> "(a) Additional bonds may be authenticated and delivered under the Indenture in a principal amount not in excess of
>
> (1) a like amount of cash deposited with the Indenture Trustee;
>
> (2) a like principal amount of retired bonds; or
>
> (3) sixty per centum (60%) of the bondable value of net property additions;
>
> *provided that net earnings available for the payment of interest* during any twelve (12) consecutive calendar months during the period of fifteen (15) calendar months immediately preceding the first day of the month in which application is made to the Indenture Trustee for the authentication and delivery of such additional bonds shall be *at least equal to twice the annual interest requirements* on all bonds authenticated and delivered under the Indenture and prior lien obligations which will be outstanding immediately after the authentication and delivery of such additional bonds. Notwithstanding any of the foregoing, no earnings test need be met if such additional bonds are to be authenticated and delivered solely for the purpose of refunding an outstanding series of bonds issued under the Indenture or prior lien obligations, bearing a higher interest rate than such additional bonds, or for refunding an outstanding series of bonds issued under the Indenture or prior lien obligations within two years of maturity." (Emphasis supplied.)

The Statement of Policy Regarding Preferred Stock has parallel provisions, which need not be quoted here.

The coverage provision provides for 1.5 times annual interest and preferred stock dividends.

Potomac's indenture and charter provisions are in conformity with these Securities and Exchange Commission requirements. Thus it is apparent that the West Virginia Public Service Commission in setting Potomac's rates for electric service to its West Virginia customers, *proceeded on a plainly erroneous premise*. It did not take the Company's coverage requirements into consideration, because, as it said, it thought they were just a "rule of thumb." This Court, however, has expressly held that it is not theory but the impact of a rate order which counts and that a utility *must* be allowed a rate sufficient to ensure its financial integrity, so as to enable it to maintain its credit *and to attract capital. Federal Power Commission* v. *Hope Natural Gas Co.*, 320 U. S. 598 (1944). Since it has *admitted* that it did not understand the coverage requirements imposed upon the Company by law, it is clear that the West Virginia Commission not only did not comply with the standards set forth by this Court, but did not understand what it was doing. Indeed, the Commission (and the Supreme Court of Appeals by refusing to reverse) went so far as to find that normalization of deferred tax treatment benefits and the inclusion of construction work-in-progress in the rate base were not required because of Potomac's supposed "financial health," an astounding conclusion to be reached in the same case in which the Commission failed to provide sufficient rate to enable the Company to attract capital.

This is no minor problem. In order to continue to provide adequate electricity to its customers in its service area, Potomac, and indeed virtually *all* utilities, must undertake continuing construction programs to replace and expand capital facilities. In order to finance such construction, a utility must raise capital, primarily by selling bonds and preferred stock. However, as demonstrated above, a

utility cannot sell additional bonds unless its current revenues cover the interest due on indebtedness two times, and it cannot sell additional preferred stock unless its current revenues cover the dividends due on its preferred stock one and a half times. Because the rates imposed by the West Virginia Public Service Commission, which the West Virginia Supreme Court of Appeals declined to review, did not allow Potomac sufficient revenues to cover interest on bonded indebtedness and dividends on preferred stock at the above-required ratios, Potomac is effectively prohibited from financing its future construction programs through sale of bonds or preferred stock.

The Company is in an untenable position. It cannot do what it must do to provide that reliable service which the Public Service Commission and the public expected it to provide. This Court is its only hope for relief.

2. **West Virginia Code, Chapter 24, Article 5, Section 1, pursuant to which a utility may seek discretionary review only of orders of the West Virginia Public Service Commission, is unconstitutional.**

As shown, the West Virginia Public Service Commission proceeded on a plain and undisputed misapprehension as to the applicable law. This makes it even more unreasonable that the West Virginia Supreme Court of Appeals, to which the issue was clearly presented, declined to review the case on the merits.

This case does *not* present any question as to the reasonableness of the requirements of the Securities and Exchange Commission nor, for that matter, any issue at this stage as to the impact of such requirements on the ratemaking process. It presents the question whether a utility, whose rates have been set by a regulatory agency proceeding under a plain and admitted misapprehension as to the law, is entitled to have access to *some* court for judicial review of that agency's action.

This Court has expressly held that a utility is, under the Fourteenth Amendment of the United States Constitution, entitled to the independent judgment of a court on ratemaking questions. This would be true even where there was no admitted error. The fact that there *is* undisputed error in this case simply makes it more imperative that this Court provide Potomac Edison with relief. There is now no other court which can do so.

Many years ago, this Court ruled in *Ohio Valley Water Co.* v. *Ben Avon*, 253 U. S. 287 (1920), that when a utility appeals a state rate order to a court of law, the court must exercise "its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, Fourteenth Amendment."* This doctrine was reaffirmed 16 years later in *St. Joseph Stock Yards Co.* v. *United States*, 298 U. S. 38 (1936).

Most jurisdictions provide for appeal as of right from rate regulatory orders by their various public service commissions. Thus the *Ben Avon* issue does not frequently arise. Regulation in West Virginia is an exception.

This discretionary appeal of Public Service Commission orders provided by West Virginia Code, Chapter 24, Article 5, Section 1, is the sole means by which the Commission's orders may be reviewed. Whether to accept an appeal under that statute is totally within the discretion of the West Virginia Supreme Court of Appeals. The Court need not exercise an independent review as to the law and the facts. See *Preston County Light and Power Company* v. *Public Service Commission*, 297 F. Supp. 759, 766 (S. D. W. Va. 1969), where the Court expressly described Chapter 24, Article 5, Section 1, as "not calling for an independent judgment as to both law and facts."

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*253 U. S., at 289.

The West Virginia Supreme Court of Appeals has consistently declined to review rate orders of the West Virginia Public Service Commission. *In this case, it did so even though it was confronted with an undisputed error of law.* It even declined to grant a stay of a $10,000,000 refund pending appeal. Certainly, as applied, the West Virginia provision for discretionary review of orders of the Public Service Commission is in plain conflict with the doctrine of the *Ben Avon* case. This Court must grant relief and hold that public utilities in West Virginia are entitled to access to the judicial system.

CONCLUSION

For these reasons, a writ of *certiorari* should issue to review the judgment and opinion of the Supreme Court of Appeals of the State of West Virginia.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this ..... day of December, 1977, three copies of the Petition For Writ Of Certiorari were mailed, United States postage prepaid, to ARNOLD O. WEIFORD, ESQ., CLEMENT R. BASSETT, ESQ., State Capital Building, Charleston, West Virginia 25305, Counsel for Respondent. I further certify that all parties required to be served have been served.

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APPENDIX A

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION of WEST VIRGINIA at the Capitol in the City of Charleston on the 5th day of April, 1977.

Case No. 8280

THE POTOMAC EDISON COMPANY,
a corporation.
In the matter of increased
rates and charges.

PROCEDURE

On June 30, 1975, The Potomac Edison Company, a corporation, filed with the Public Service Commission the following revised tariff sheets to its tariff designated P.S.C. W.Va. No. 1, stating increased rates and charges for furnishing electric service in the entire territory served by it in the state of West Virginia, to become effective July 30, 1975:

First Revision of Original Sheet No. 4-3
Second Revision of Original Sheet No. 8-1
Third Revision of Original Sheet No. 9-1
Second Revision of Original Sheet No. 10-1
Second Revision of Original Sheet No. 11-1
Second Revision of Original Sheet No. 11-2
Second Revision of Original Sheet No. 12-1
Second Revision of Original Sheet No. 13-1
Second Revision of Original Sheet No. 14-1
Second Revision of Original Sheet No. 15-1

Second Revision of Original Sheet No. 16-1
Second Revision of Original Sheet No. 17-1
Second Revision of Original Sheet No. 17-2
Second Revision of Original Sheet No. 18-1
Second Revision of Original Sheet No. 19-1

By order entered on July 8, 1975, The Potomac Edison Company was made respondent to this proceeding and the revised tariff sheets were suspended and the use of the rates and charges stated therein deferred until November 26, 1975, unless otherwise ordered by the Commission, to enable the Commission to examine and investigate the supporting data filed with said revised tariff sheets and to provide time for the Commission's Division of Accounts, Finance and Rates to make a study and report concerning the matters involved therein.

The aforesaid order further provided that if the case was not finally decided at the expiration of the suspension period, the rates and charges applied for should not be placed into effect until the respondent enters into a bond with surety approved by the Commission (which approval must be given by the Chairman of the Commission indicating the same thereon) in the amount of Four Million Five Hundred Thousand Dollars ($4,500,000) conditioned for the refund to the persons or parties entitled thereto of the amount of the excess, if any, plus interest thereon, as shall be determined by the Commission, as required by Chapter 24, Article 2, Section 4 of the Code of West Virginia, as amended.

A proper bond was filed on November 25, 1975. Interest was set at seven and one-half percent per annum as required by statute upon the amount of refunds, if any.

By order entered on May 20, 1976, this matter was set for hearing to be held in the Commission's Hearing

Room at the Capitol in the City of Charleston on July 7, 1976, at which time and place the respondent was directed to appear and prosecute said tariff filing. Leave was further granted to anyone interested to appear and make such objection thereto as may be deemed proper. The aforesaid order further required the respondent to give notice of the filing of the revised tariff sheets and of the time and place of hearing thereon by posting a copy of said order in a conspicuous place where bills for electric services are paid for a period of at least twenty days prior to July 7, 1976, for public inspection, and by publishing a copy of said order once a week for two consecutive weeks, the first publication to be made not more than thirty days nor less than fifteen days prior to July 7, 1976, in a newspaper published and of general circulation in each of the Counties of Berkeley, Grant, Hampshire, Hardy, Jefferson, Mineral and Morgan, making due return thereof to the Commission on or before the day of hearing.

Proper notice was given and the hearing was held as scheduled. The respondent was represented by Willis O. Shay and James D. Gray, its attorneys; the Commission's Staff was represented by Thomas N. Hanna and Travers Harrington, attorneys; David T. Carden and Thomas Wagoner, accountants; and David Mathews, engineer. Appearing on behalf of an intervenor, Martin Marietta Corporation, was T. D. Kauffelt, attorney at law.

The intervenors, Berkeley County Court and Counsel for Eastern West Virginia Consumers were represented by William H. Loy, attorney at law.

There had been 45 letters of protest received protesting the proposed rates, all of which were duly lodged in the file of this proceeding. At the close of the hearing on July 7, 1976, the hearing was continued to August 23, 1976, at Martinsburg, West Virginia.

In compliance with the adjournment of July 7, 1976, hearing was resumed at the Berkeley County Courthouse at Martinsburg, West Virginia. At this session additional appearances were, Robert B. Murdock appearing as co-counsel for respondent, and Harry Pitts, Director of Commission's Engineering Division. This hearing dealt primarily with testimony from twenty ratepayers with protests and matters relative to billing practices. At the conclusion of the second day of hearing in Martinsburg, West Virginia, August 24, 1976, the case was continued to September 7, 1976, at Charleston, West Virginia.

The September 7, 1976 hearing was held as scheduled and on September 9, 1976, the taking of testimony was completed and upon receipt of additional exhibits the matter was submitted for decision, subject to the filing of briefs. There were no additional parties noting their appearances on the three final days of the hearing. The final brief was received by the Commission on January 18, 1977.

EVIDENCE

The evidence in this case consists of a 999 page transcript of the proceedings, 26 exhibits received on behalf of the respondent, eight on behalf of the Commission's staff, one on behalf of industrial intervenors, and one protestant's exhibit.

The Potomac Edison Company is the primary supplier of electric service in Jefferson, Berkeley, Morgan, Hampshire, and Hardy Counties, and also serves parts of Mineral and Grant Counties, all of which are located in West Virginia. At the end of 1975 the company served 55,721 electric customers in its West Virginia service area, consisting of 2,654 square miles. In addition, Potomac Edison operates in continguous portions of Maryland, Pennsylvania, and Virginia. It is a subsidiary of Allegheny Power System, Inc. Potomac Edison and its sister operating

companies, Monongahela Power Company and West Penn Power Company, also subsidiaries of Allegheny Power System, Inc., operate as an integrated multi-state electric system. Bulk power supply, engineering, computer, information services, and other aspects of system operations for all three operating companies are functions of Allegheny Power Service Corporation, an integral part of the Allegheny Power System and also a subsidiary of Allegheny Power System, Inc.

The merger of Potomac Edison of West Virginia and two other Potomac Edison subsidiary companies into the present Potomac Edison Company took place during the test year, in this case 1974, and the merger was approved by this Commission in Case No. 7698. For all practical purposes, the operations in West Virginia is the same as before the merger.

The company contends that during the five years ended December 31, 1975, it made additions of about $211 Million and retirements of about $15 Million in gross property. Construction expenditures for 1976 and 1977 are now estimated at $63 Million for 1976 and $89 Million for 1977. Included in this $152 Million are about $82 Million for new generating capacity, about $60 Million for transmission and distributing, and about $10 Million for other facilities.

The generating capacity under construction consists of two 626,000 kilowatt (net) coal-fired steam electric generating units at the proposed Pleasants Station in West Virginia. The company, under present projections, will have an undivided 30% interest in the Pleasants Station, the remaining undivided interest being owned by affiliates. The company's share of the total cost of the Pleasants units is currently estimated at $185 Million, of which $20 Million had been expended as of April 30, 1976. Completion of

the Pleasants units, originally scheduled for 1978 and 1979, has been deferred to 1979 and 1980. A substantial part of the cost of the Pleasants units is due to requirements of environmental authorities. Facilities to meet these requirements are not revenue - producing. In fact, they add significantly to the cost of the construction they must undertake and the operation of the power station. The present estimate of the Company's portion of the cost of the Pleasants units includes about $54 Million for environmental protection equipment. Of this total, about $27 Million is for a flue gas desulfurization system for reduction of sulfur oxide emissions.

For the five years 1976-1980, it is estimated that The Potomac Edison Company will have to spend approximately $460 Million on its total construction program.

In this proceeding The Potomac Edison Company seeks an increase in rates and charges in excess of $4,491,000. The rates proposed by it would, according to staff, increase annual revenues to $34,098,702 and produce a rate of return of 13.83 per cent upon its West Virginia business, this being substantially in excess of the company's requested rate of return herein of 9.25 per cent.

At pro forma, the basic variance in the financial exhibits of the Company and Commission's staff are as follows:

	Company	Staff
Operating Revenues	$34,019,208	$34,098,702
Operating Revenue Deductions	27,709,239	25,031,325
Net Operating Income	$ 6,309,969	$ 9,067,377
Rate Base	$68,207,859	$65,585,659
Rate of Return	9.25%	13.83%

The industrial intervenor, Martin-Marietta Corporation, seeks to eliminate the alleged discrimination existing between Potomac Edison's rate "PP" in West Virginia and in other states it serves.

The number of protest letters received by the Commission and the statements of the protestants who appeared and testified in this case may be summarized as follows: (1) Persons living on fixed incomes who contend that the requested rates would put electric service out of their financial reach. (2) Those who cited deficiencies in quality of service. (3) Collection and deposit practices of the respondent, especially as they relate to Senior Citizens and low income cases.

ISSUES

Although there were fifteen staff adjustments in this case, the litigants and their counsel successfully eliminated all but four of the issues raised by staff's adjustments for accounting modifications and for going level and pro forma projections of revenue, cost of service and rate base. The adjustments not enumerated below were acknowledged by the respondent to be correct, or were uncontested.

The four contested "adjustment" issues involve (1) unrecovered rate case expenses, (2) the amount of rate case expense to be included in respondent's cost of service for determining respondent's future rates, (3) Industrial Expansion Credit for West Virginia Business and Occupation tax and allocation of the manufacturing tax on exported power, (4) Federal Income tax: Normalization and consolidated tax savings.

In addition to these four issues on the propriety of staff adjustments, the Commission is faced with the rate base composition issues of construction work in progress and working cash allowance.

Further, the Commission is faced with the issue of the rate of return to allow on respondent's rate base.

The final issue presented by the respondent is the loss of delayed payment penalty revenue.

We will discuss the issues described in the above sequence. **The Commission may, in certain instances, decide various issues differently on a company-by-company basis. This is not inconsistent** and is in keeping with the desired goal of reasonable regulation if it results in just and reasonable rate levels which guarantee the continuity of good service while neither rewarding a utility for poor and imprudent management nor penalizing a utility for efficient management.

Expenses — Prior Rate Case

In order to avoid distortion of respondent's pro forma or estimated future cost of service and to determine costs which will be more truly representative of future operating expenses, the costs associated with respondent's prior rate cases will not be included in the Company's test-year calculations.

Expenses — Present Rate Case

The respondent has the burden of proving the propriety of its rate case expenses. The respondent revised its estimated amount of present rate case expense for $46,000 to $86,000. Staff and respondent agreed to the revised amount but disagree over the proper amount of present rate case expense in arriving at allowable operating expenses in the determination of the revenue requirement and rates in this case.

After consideration of all the factors the Commission will allow one-third or $28,700 of the revised rate case expense for rate making purposes.

See Re: *The Potomac Edison Company of West Virginia,* Case No. 7784.

Expenses — West Virginia Business and Occupation Tax — Industrial Expansion Credit

This credit was not accrued on the company's books during the test year because the company felt that it might ultimately not be allowed. The staff on the other hand used the Industrial Expansion Credit claimed on the respondent's West Virginia tax return to adjust downward the respondent's tax liability.

The Commission will accept the staff's calculation of the West Virginia Business and Occupation tax liability, including the credit for industrial credit.

See Re: *Monongahela Power Company,* Case No. 8127.

In regard to the manufacturing tax, it is applicable only to exported electric energy.

Expenses — Income Taxes — Normalization

The respondent, for purposes of developing a federal income tax liability to be used in this case, added back $428,970 to its federal income tax to reflect normalization of tax deferrals resulting from the use of liberalized depreciation on post 1969 utility property and repaid allowance. The staff did not follow the "normalization" approach, but instead, reflected all statutory deductions including liberalized depreciation and the repair allowance in calculating a federal income tax liability.

When depreciation is normalized, the ratepayers are charged not the actual income taxes paid, but a hypothetical larger figure as an operating revenue deduction for the taxes computed as if tax depreciation was figured on a straight-line basis. The difference between the actual taxes

paid the Internal Revenue Service and the larger hypothetical amount utilized as an operating revenue deduction for rate making, is accumulated in a "deferred tax" account. These funds came from the ratepayer.

Under the flow-through treatment of liberalized depreciation, the ratepayers reimburse the respondent for its allocated portion of the consolidated federal income taxes to be paid by its taxable utility, the Allegheny Power System, Inc.

See Re: *Alabama - Tennessee Natural Gas Company* v. *Federal Power Commission,* 64 PUR 3d 81.

This Commission is well aware of all the many arguments with regard to "normalization" of tax benefits associated with liberalized depreciation.

As is the case with so many issues which must be decided by a regulatory commission in setting rates, the item of tax benefits arising from accelerated depreciation must be considered as an integral part of the overall cost of service; not as a totally separate item to be decided one way or the other irrespective of the respondent's overall financial condition. **The Commission may, in certain instances, decide various issues differently on a case-by-case basis.**

While the Commission may have in the past and may in the future, depart from disallowing normalization to alleviate financing problems or to avoid extreme difficulties, neither of these problems appear in the record of this case. The company's request to "normalize" current income tax benefits associated with liberalized depreciation is therefore denied and the benefits realized will be "flowed-through" to the ratepayers in this instance.

See Re: *Monongahela Power Company,* Case No. 8127.

Expenses – Income Tax – Consolidated Tax Savings

The Allegheny Power System, of which the respondent is an operating subsidiary, files a Consolidated Federal Income Tax Return. It has always been the staff's policy, when a utility files a consolidated return, to calculate the savings resulting from the consolidated return and to share those savings as among the parent corporation and the appropriate ratepayers.

(See: *Columbia Gas* Case No. 8000, order, June 16, 1976 pp. 26-32).

The staff calculated the consolidated tax saving by the method historically followed by this Commission. By taking a three year average of the tax savings, the staff arrived at a percentage savings of 7.02%, which when applied to the respondent's taxable income in arriving at the cost of service presented on Appendix I of this order, amounts to $57,403.

The respondent apparently disagrees with the Commission's method due to the fact that in one of the years considered, 1974, The Potomac Edison Company had no taxable income.

The staff's position is simply that it used a three year average of the Allegheny Power System, of which the respondent is but one operating subsidiary, in calculating the consolidated tax saving. By using the most recent three years available, the staff felt it could most accurately reflect the actual tax savings accruing to the Allegheny Power System and its operating subsidiaries. The fact that the respondent had no taxable income during the test year, would only serve to be relevant if the respondent were continually in that position. As in the case of all regulated utilities, any loss incurred is only of a temporary nature, until rate relief can be obtained. Thus, rather than con-

sidering the actual situation of the operating company itself, it is fair to calculate the percentage savings on a system basis, after eliminating loss companies, over some recent period of time, and then apply the average savings to the projected income of the respondent.

The Commission will accept staff's calculation of consolidated tax savings in this case.

Rate Base (Valuation) – Construction Work in Progress

The respondent has included a rate base adjustment in the amount of $2,076,569. In our decision in Case No. 7083 (Appalachian Power Company) this Commission did depart from a strict use of average rate base and exclusion of all construction work in progress from the rate base insofar as investment in electrostatic precipitators was concerned. The Commission's staff has recommended in this case the inclusion in the rate base adjustments for environmental equipment through November, 1975, the month proposed rates become effective under bond. These adjustments include an electrostatic precipitator at Albright Power Station and a cooling tower at Hatfield Power Station Unit No. 1. West Virginia's jurisdictional portion of the pollution control equipment is $92,577 and $430,269, respectively, for a total of $522,846. In keeping with our decision in Case No. 7083, and for substantially similar reasons as outlined in the order in that case, we will allow respondent's investment in the above pollution control equipment in the rate base, and will therefore accept the staff's adjustment of $522,846 as a proper inclusion in the rate base of this case. Our decision in this matter should be reflected by the Potomac Edison Company through the proper elimination of any allowance for funds used during construction on the pollution control equipment subsequent to the date that rates in this case became effective.

Rate Base (Valuation) – Working Capital Allowance

Working capital as a rate base item is an allowance which recognizes the need of a company to supply its own funds to meet current obligations as they arise so as to operate efficiently and economically. Ordinarily it is taken at one-eighth of the total annual cash operating expenses that require working capital; that is a figure equal to forty-five days of such expense. The figure is widely used, subject to a modification to meet particular situations.

Respondent uses a one-seventh method to arrive at a rate base working capital allowance because it bills on a combination of bi-monthly and monthly billings, this was used by the Commission in Case No. 7784. In this case respondent is advocating additionally the inclusion of compensating balances and petty cash in the calculation of the working capital allowance in its rate base. Also, respondent objects to the exclusion of fuel expense by the staff as a modification of the formula method.

A. Fuel Expense

Major generation of electricity by the Allegheny System is done by jointly owned generating stations of which Potomac Edison owns an interest. An in depth study of coal purchases and payment was made by staff in Case No. 8127, Monongahela Power Company (a joint owner and sister company of respondent). The staff, based on its study, contended in that case, that there should be no inclusion of coal expense in the computation of working capital allowance because of the time that elapses from the date of purchase to the date of payment for coal used by the generating stations. Staff suggests that this is substantially the same reason that purchased power is eliminated from operating expenses under the forty-five day rule, and that the delivery payment dates for Mononga-

hela's coal purchases justify similar treatment. See Re: *Monongahela Power Company*, Case No. 8127.

In the case of The Potomac Edison Company, a joint-owner of the major generating stations, the staff feels that the above study is valid because there is no reason to believe that the practice for payment of fuel differ between jointly-owned stations and stations owned only by respondent.

The respondent did not cross-examine or rebut this position taken by staff in this case. For the above stated reasons we will accept staff's recommendations in regard to coal expense in working capital allowance.

B. Petty Cash

The respondent requested the sum of $484,813 in petty cash as a working capital allowance. Basically, the operation and maintenance expense allowance covers any cash on hand requirement of the utility. The Commission will disallow a working capital allowance for petty cash.

C. Compensating Bank Balances

Respondent requested the sum of $3,735,000 in compensating bank balances as a working capital allowance. The need for cash working capital has been ascertained by the staff and an allowance for compensating bank balances results in an additional allowance upon which the ratepayers should not be required to pay a return.

For the above stated reasons, we will accept the staff methodology for calculation of a reasonable allowance of $989,570 for working capital allowance in this case.

Rate of Return

Two witnesses presented testimony bearing on the cost of capital. Testimony on behalf of the respondent was

proffered by W. Truslow Hyde, Jr. He used the average capitalization estimated to be outstanding during 1976 and recommended a cost of capital of 10.30 per cent. The cost of equity capital was predicated on interest rates or the ratio of interest rates and the cost of equity. He states this method is very similar to the Discounted Cash Flow method (DCF). In his calculations he used a market premium of 25 per cent over book value for equity.

Mr. J. M. McCardell, Executive Vice-President and General Manager of the respondent, in his direct testimony states "we are requesting an overall rate of return of 9.25 per cent on our average rate base during 1974 which we believe is at the very bottom of the zone of reasonableness . . ."

The other witness presenting cost of capital testimony was Laxmi N. Mehra on behalf of the staff. He based his recommended cost of capital on two commonly used methods: The Interest Coverage Method and Market Value – Book Value Model. Mr. Mehra recommended a cost of capital of 9.07 per cent. Both witnesses have presented evidence and views that were helpful in assisting the Commission in the formulation of an informed judgment as to rate of return. There was no irrefutable testimony and both witnesses made significant subjective judgments along the way to his conclusion. Further, no number emerges from the evidence as an indisputable cost of capital.

After considering the cost of capital and other factors within a zone of reasonableness and applying its informed judgment we find that the respondent should be given the opportunity to earn a 9.15 per cent return upon staff's adjusted rate base of $65,585,659. The Commission is of the opinion that such a rate of return will permit the respondent to render reliable service to its customers at just and reasonable rates and should be adequate to allow it to

maintain its credit standing and to attract necessary capital for such purposes.

Delayed Payment Penalty Revenue Loss

The respondent's claim of a loss in revenue due to the extension of the time frame from ten to twenty days is based on experience in another jurisdiction and on a different number of days. We agree with the staff position that the effect of the extension is too uncertain to predict any change in revenue levels. The evidence presented illustrates the onerous burden placed on the ratepayer by the shorter period in view of the postal delivery situation and other factors. The Commission notes that there is a national trend towards prohibiting delayed payment penalties for residential ratepayers and that one major utility in this state has eliminated the penalty.

COMMENTS

Fuel Expense

As a result of the elimination of the fuel adjustment clauses in the state of West Virginia, it is necessary for the Commission to determine a proper going-level fuel cost to include in the operating expenses in this case. The staff presented considerable data with regard to fuel costs, fuel consumption, and average cost per KWH generated. The staff's cost of service in this case includes a going-level fuel expense of 0.96¢ per KWH generated. We will follow the staff's calculations with regard to net fuel cost per KWH as delivered to West Virginia jurisdictional customers.

Rate Design

There is no compelling evidence in the record to materially depart from the rate design approved in Cases

No. 7784 and 8249, especially in view of the absence of a cost of service study by classes of customers. Therefore, in order to substantially maintain the historic rate design, we will approve an across-the-board percentage increase to cover the deficiency determined under this order.

In its proposed rates for "General Service – All Electric – Schedule C-A", a restriction is made to limit service under this schedule to those customers at locations served or for which contracts have been signed as of June 1, 1974. The respondent in so limiting this tariff discriminates between customers who contracted for this service prior to June 1, 1974, and those who applied for service after June 1, 1974, having the same identical service needs. The Commission, after considering the situation and reviewing cases decided in other jurisdictions relating to rate discrimination, finds that said restriction of availability is not cost justified and that it is unreasonable and unjustly discriminatory and will be disallowed.

SUMMARY

There were other differences between staff and respondent, but for purposes of this case respondent accepted the staff evidence except with respect to the issues specifically raised herein.

The specific items of cost and revenue considerations discussed and decided above are summarized in Appendix I to this decision. In summary, we find that the pro forma test year total cost of service is $28,685,324. A comparison of test year revenue at going-level from sales at rates previously approved by this Commission, indicates a total revenue deficiency of $2,114,632. Staff has prepared rate schedules in Appendix II in conformity with the findings and conclusions set forth in this decision.

FINDINGS

1. Respondent's rates and charges last approved by this Commission are unjust and unreasonable in that they will not produce sufficient revenues to enable the respondent to pay its reasonable and necessary operating expenses and taxes, provide for depreciation, and earn a fair return on its property used and useful in its public service business.

2. Respondent's rates and charges now in effect under bond are likewise unjust and unreasonable in that they would produce more revenues than are needed for the aforesaid purposes.

3. The rates and charges hereinafter approved are just and reasonable in that they should produce revenues sufficient, but not more than sufficient, for the aforesaid purposes, (Appendix II).

ORDER

1. The rates and charges that respondent now has in effect under bond are hereby canceled and stricken from the tariff files of the Commission.

2. The rates set out in Appendix II that is hereto attached, be approved, to become effective November 26, 1975.

3. The respondent shall refund to the persons or parties entitled thereto, within sixty days of the date of this order the amount of excess collected under the rates placed into effect under bond and the amount which would have been collected under the rates that are herein approved, with interest thereon, at the rate of seven and one-half per cent (7½%) per annum, until paid; that refunds of Five Dollars ($5.00) or less may be made by crediting the amount of the subscriber's account, and that

as to amounts in excess of Five Dollars ($5.00) the refund shall be made by check. The calculation of refunds should be made on a monthly basis and in no case shall the respondent retroactively charge a subscriber, either through adjusted billing or offsets against ? ? ? ? accounts, in any months where the rates herein ordered exceed the interim rates.

The respondent shall report to the Commission the amount refunded, including the interest, the manner of refunding and the amount, if any, which it has been unable to refund.

4. Respondent shall file with the Commission, tariff sheets stating its rates and charges as specified herein.

A COPY.

TESTE:

S. GROVER SMITH, JR.
Secretary

APPENDIX I

THE POTOMAC EDISON COMPANY
COST OF SERVICE AND DEFICIENCY OF 9.15% RETURN
CASE NO. 8280

	Amount
	$
Operation and Maintenance Expenses	17,116,556
Depreciation and Amortization	2,465,342
Payroll Taxes	126,960
Taxes Other Than Payroll and Income	2,221,439
Federal Income Taxes	642,735
Return (Rate Base $65,585,659)	28,574,179
Subtotal	26,570,692
Operating Revenue Under Present Rates	
Deficiency Under Present Rates Before Additional Gross Receipts Tax	2,003,467
Gross Receipts Tax (Deficiency x .05256)	111,145
Total Deficiency (Above Defiiciency ÷ .94744)	2,114,632
Total Cost of Service	28,685,324
Calculation of Federal Income Tax:	
Return	6,001,083
Less: Tax Deductions	4,940,276
Investment Tax Credit	30,107
Job Development Credit	29,308
Deferred Tax Write-off	58,150
Return Adjusted	943,247
$\text{Tax} = \frac{.446304 \times \text{Return Adjusted}}{.553696}$	760,300
Less: Investment Tax Credit	30,107
Job Development Credit	29,308
Deferred Tax Write-off	58,150
Provision for Federal Income Tax	642,735

Determination of Tax Rate:	
Tax Rate	.480000
Tax Savings (.48 x .0702)	.033696
Tax Rate After Savings	.446304

APPENDIX II

THE POTOMAC EDISON COMPANY
RATES APPROVED
CASE NO. 8280

RESIDENTIAL SERVICE

SERVICE "R"

(Rate Code No. 300 and 302)

Availability

Available for single phase residential service through one meter.

Monthly Rate

Customer will be charged at whichever of the following monthly rates is applicable:

Customer Without Electric Water Heating

First 50 Kwh	6.837 cents per Kwh
Next 100 Kwh	4.972 cents per Kwh
Next 600 Kwh	3.218 cents per Kwh
Over 750 Kwh	2.924 cents per Kwh

Customer With Electric Water Heating

First 50 Kwh	6.837 cents per Kwh
Next 100 Kwh	4.972 cents per Kwh
Next 300 Kwh	2.631 cents per Kwh
Next 300 Kwh	3.218 cents per Kwh
Over 750 Kwh	2.924 cents per Kwh

Customers who qualify for the water heating rate must use electric energy as the sole means of water heating. Each heating element shall not exceed 5,500 watts, shall

operate at 200 volts or higher and be controlled by a thermostat; tanks shall be equipped with interlocks, to prevent simultaneous operation, when using elements with a combined capacity in excess of 5,500 watts; the minimum tank size shall be 30 gallons.

Minimum Charge

$2.70 per month.

Late Payment Charge

2% of the bill on the above net rates and Minimum Charge.

RESIDENTIAL SERVICE – ALL ELECTRIC
SCHEDULE "R - A"
(Rate Code No. 331)

Availability

Available for single phase residential service where the entire residence is heated electrically and when all other electrical uses in the residence are billed under this schedule.

Monthly Rate

First 150 kilowatt hours used for $8.45
Next 250 kilowatt hours 3.126 cents per kilowatt hour
Next 1,250 kilowatt hours 2.508 cents per kilowatt hour
Over 1,650 kilowatt hours 2.313 cents per kilowatt hour

Late Payment Charge

2% of the bill on the above net rates and Minimum Charge.

GENERAL AND COMMERCIAL SERVICE

SCHEDULE "C"

(Rate Code No. 360 and 363)

Availability

Available for single phase and three phase service at standard Company voltage below 15,000 volts. The standard voltage available depends upon the location, character and size of Customer's load. This information can be furnished at any of the Company's offices.

Monthly Rate

First 50 kilowatt hours used
7.532 cents per kilowatt hour

Next 300 kilowatt hours used
5.474 cents per kilowatt hour

Next 350 kilowatt hours used
4.445 cents per kilowatt hour

All Over 700 kilowatt hours used
2.761 cents per kilowatt hour

When Customer requires capacity over 7.5 kilowatts, the third energy block shall be increased 53 kilowatt hours for each one-half kilowatt of capacity required in excess of 7.5 kilowatts. The fourth energy block shall then include all kilowatt hours in excess of the first, second and third energy blocks as adjusted for such additional capacity.

Minimum Charge

$1.25 per kilowatt of capacity required but not less than $3.00 per month.

Capacity to be used in determining the minimum charge shall be the capacity required in the current month,

but not less than one-half the highest kilowatt capacity required in the preceding eleven months.

Voltage Discount

Company will furnish service at one voltage and at one point from the Company's existing distribution system voltage. Where Customer takes service at a voltage between 2,000 and 15,000 volts and provides all facilities beyond the service point, a voltage discount of 7¢ per kilowatt will apply.

Late Payment Charge

2% of the bill on the above net rates and Minimum Charge.

Determination of Capacity

Capacity required is the highest demand established over a 30-minute interval.

Capacity required will be determined to the nearest one-half kilowatt.

GENERAL SERVICE – ALL ELECTRIC

SCHEDULE "C - A"

(Rate Code No. 361, 362 and 364)

Availability

Service under this schedule is available throughout the entire territory served by the Company.

Application

This schedule applies to Customers contracting for electric service to heat their entire establishment by the

use of electricity and when all other electric uses in the establishment are billed under this schedule. Not applicable to establishments whose primary operations are conducted outside the heated area.

Monthly Rate

First 50 kilowatt hours used
7.728 cents per kilowatt hour

Next 300 kilowatt hours used
5.278 cents per kilowatt hour

Next 350 kilowatt hours used
4.328 cents per kilowatt hour

All Over 700 kilowatt hours used
2.436 cents per kilowatt hour

When Customer requires capacity over 7.5 kilowatts, the third energy block shall be increased 37 kilowatt hours for each one-half kilowatt of capacity required in excess of 7.5 kilowatts. The fourth energy block shall then include all kilowatt hours in excess of the first, second and third energy blocks as adjusted for such additional capacity.

Minimum Charge

$1.25 per kilowatt of capacity required but not less than $6.75 per month.

Capacity to be used in determining the minimum charge shall be the capacity required in the current month but not less than one-half the highest kilowatt capacity required in the preceding eleven months.

Voltage Discount

Company will furnish service at one voltage and at one point from the Company's existing distribution system voltage. Where Customer takes service at a voltage be-

tween 2,000 and 15,000 volts and provides all facilities beyond the point of service, a voltage discount of 7¢ per kilowatt will apply.

Late Payment Charge

2% of the bill on the above net rates and Minimum Charge.

Service Supplied to Schools, Churches and Public Libraries With Space Heating

When a school, church, or public library uses electric service as the only means of space heating in a building, buildings, or in a separate area of a building then the kilowatt hours used in the building, buildings, or separate area of a building will be billed at the above prices. When all energy uses, except as provided hereafter, for space heating, lighting, cooking, water heating, cooling (if any) and power are provided by electrical energy, all kilowatt hours will be billed at 2.436 cents per kilowatt hour. Any form of energy may be used for instruction, training and demonstration purposes and will be excluded from the above requirement.

A building, buildings, or separate area of a building not meeting the condition of this provision shall be separately metered and billed under the applicable rate. The word school or library as used herein refers to a school or library operated through the use of public funds or by a non-profit organization.

A school building refers to a building containing any of the following facilities: classrooms, laboratories, manual arts shops, domestic science kitchens, gymnasium, dining areas, dormitories and other facilities used for educational purposes. Service for athletic field flood lighting shall be excluded from service supplied under this provision and shall be billed for service separately.

A church building refers to a building used principally for religious worship and services.

LIGHT AND POWER SERVICE
(Low Load Factor)
SCHEDULE "PL"
(Rate Code No. 383 and 388)

Availability

Available for loads of 50 kilowatts or greater at standard single phase and three phase voltages. The standard voltages available depend upon location, character and size of Customer's load. This information can be furnished at any of the Company's offices.

Monthly Rate

KILOWATT CHARGE

$1.70 per kilowatt

REACTIVE KILOVOLT-AMPERE CHARGE

25¢ per reactive kilovolt-ampere of Customer's reactive kilovolt-ampere capacity requirement in excess of 25% of the Customer's kilowatt demand.

ENERGY CHARGE

First 10,000 kilowatt hours used
2.908 cents per kilowatt hour

Next 90,000 kilowatt hours used
2.320 cents per kilowatt hour

Next 100,000 kilowatt hours used
2.025 cents per kilowatt hour

All Over 200,000 kilowatt hours used
1.829 cents per kilowatt hour

Minimum Charge

$1.75 per kilowatt based on one-half of the highest kilowatt capacity required in the preceding eleven months.

Voltage Discount

Company will furnish service at one voltage and at one point from the Company's existing distribution system voltage. Where Customer takes service at a voltage between 2,000 and 15,000 volts and provides all facilities beyond the service point, a voltage discount of 7¢ per kilowatt will apply and 15¢ per kilowatt for voltages over 15,000 volts.

Late Payment Charge

2% of the bill on the above net rates and Minimum Charge.

LIGHT AND POWER SERVICE
(High Load Factor)
SCHEDULE "PH"
(Rate Code No. 381 and 385)

Availability

Available for loads of 50 kilowatts or greater at standard single phase and three phase voltages. The standard voltages available depend upon location, character and size of Customer's load. This information can be furnished at any of the Company's offices.

Monthly Rate

KILOWATT CHARGE

First 500 kilowatts of capacity required per month
$3.46 per kilowatt

All Over 500 kilowatts of capacity required per month
$3.11 per kilowatt

REACTIVE KILOVOLT-AMPERE CHARGE

25¢ per reactive kilovolt-ampere of Customer's reactive kilovolt-ampere capacity requirement in excess of 25% of the Customer's kilowatt demand.

ENERGY CHARGE

First 45,000 kilowatt hours used
1.933 cents per kilowatt hour

Next 55,000 kilowatt hours used
1.669 cents per kilowatt hour

All Over 100,000 kilowatt hours used
1.562 cents per kilowatt hour

Minimum Charge

$1.75 per kilowatt based on one-half of the highest kilowatt capacity required in the preceding eleven months.

Voltage Discount

Company will furnish service at one voltage and at one point from the Company's existing distribution system voltage. Where Customer takes service at a voltage between 2,000 and 15,000 volts and provides all facilities beyond the service point, a voltage discount of 7¢ per kilowatt will apply and 15¢ per kilowatt for voltages over 15,000 volts.

Late Payment Charge

2% of the bill on the above net rates and Minimum Charge.

POWER SERVICE – LARGE PRIMARY

SCHEDULE "PP"

(Rate Code No. 384)

Availability

Available to Customers with monthly capacity requirements of 5,000 kilowatts or more that can be served from a 138,000/34,500 volt Load Center Substation located within 5 miles of the point of delivery to the Customer. Also available to Customers with monthly capacity requirements of 10,000 kilowatts and over, located adjacent to 138,000 volt transmission lines. Service will be delivered and metered at 34,500 volts or over.

Monthly Rate

KILOWATT CHARGE

$3.20 per kilowatt

REACTIVE KILOVOLT-AMPERE CHARGE

25¢ per reactive kilovolt-ampere of Customer's reactive kilovolt-ampere capacity requirement in excess of 25% of the Customer's kilowatt demand.

ENERGY CHARGE

First 10,000 kilowatt hours $1.339 per kilowatt hour

All Over 10,000 kilowatt hours $1.263 per kilowatt hour

WATER HEATING SERVICE

SCHEDULE "W"

(Rate Code No. 340, 367 and 368)

Availability

Available for single phase water heating service, except for Customers served under the residential schedules.

Monthly Rate

2.444 cents per kilowatt hour

Minimum Charge

$3.00 per month. This minimum charge will be waived when the Customer receives service at the same point of service under another schedule of the Company.

Late Payment Charge

2% of the bill on the above net rates and Minimum Charge.

OUTDOOR LIGHTING SERVICE

SCHEDULE "OL"

(Rate Code No. 350, 356 and 358)

Availability

Available for lighting service sold for outdoor lighting supplied from the existing overhead secondary distribution system of the Company and contracted for by a private Customer.

Monthly Rate

A. For each 2,500 lumen incandescent lamp (not available for new installations) . . . $5.20 per lamp. Company will provide lamp, photo-electric relay control equipment, fixture and upsweep arm not over 4 feet in length, and will mount same on an existing pole carrying secondary circuits.

B. For each 7,000 lumen mercury vapor lamp . . . $5.25 per lamp. Company will provide lamp, photo-electric relay control equipment, fixture and upsweep arm not over 4 feet in length, and will mount same on an existing pole carrying secondary circuits.

C. For each 20,000 lumen mercury vapor lamp . . . $9.95 per lamp. Company will provide lamp, photo-electric relay control equipment, fixture and upsweep arm not over 6 feet in length, and will mount same on an existing pole carrying secondary circuits.

D. When facilities, in addition to those specified in paragraphs A, B or C are required to provide outdoor lighting service, the Customer will pay in advance the cost of installing all additional facilities, except the Company will at the Customer's request, install poles and spans of wire, which can be connected to an existing secondary circuit for which the Customer will agree to pay the Company a monthly rental of $1.30 for each standard distribution wood pole required and $0.007 per foot for each foot of span length of wires required and $1.30 for each KVA of transformer capacity installed.

E. The Customer may elect to own and maintain poles and secondary circuits on his property to accommodate the installation of the outdoor lighting fixture. Such poles and circuits shall meet company specifications.

Late Payment Charge

2% of the bill on the above net rates.

PRIVATE OUTDOOR AREA LIGHTING SERVICE

SCHEDULE "AL"

(Rate Code No. 351, 357 and 359)

Availability

Available for lighting service sold for pole mounted outdoor area lighting supplied from the existing secondary distribution system of the Company and contracted for by a private customer.

Monthly Rate

Lighting Fixture

Nominal Watts	Nominal Lumens	Floodlighting (Overhead or Underground Service)
Mercury Vapor		
400	20,000	$10.85
1,000	54,000	18.70
High Pressure Discharge		
400	44,000	16.10
Quartz Iodine		
500		11.55

Poles

Length	Wood		Metal
	Standard	Other	
14 foot		$2.60	$1.85
30 foot			5.40
35 foot	$1.80	2.75	7.45
40 foot	1.95		8.90

Overhead Circuit

$.007 per foot for each foot of span length.

Late Payment

2% of the bill on the above net rates.

PRIVATE OUTDOOR AREA LIGHTING SERVICE
SCHEDULE "AL" (Concluded)
(Rate Code No. 351, 357 and 359)

Customer Owned Equipment – Company Operates and Maintains

Whenever the Customer furnishes, installs and owns the entire lighting system using equipment approved by

and installed in a manner acceptable to the Company, the Company may, at its discretion, operate and maintain the system at the following monthly rates.

Lamp Size in Nominal Watts	Type of Lamp	Type Fixture		
		Bracket	Post Top	Floodlight
100	Mercury Vapor		$ 2.90	
175	Mercury Vapor	$ 3.55	3.45	
250	Mercury Vapor	4.65	4.65	
400	Mercury Vapor	6.40	6,40	$ 6.75
1,000	Mercury Vapor	13.35	13.65	12.70
1,600	Mercury Vapor		20.90	
4,000	Mercury Vapor		45.10	

The Company's responsibility under the aforementioned charges for maintaining the Customer owned lighting system is limited to photo control, relamping, cleaning fixtures and painting poles requiring paint. When the Customer's equipment is intermediate in size to those listed above the Customer shall pay the monthly charges applicable to the next largest size.

MERCURY VAPOR STREET AND HIGHWAY LIGHTING SERVICE

SCHEDULE "MSL"

(Rate Code No. 372)

Availability

Available for lighting service sold for the lighting of public streets, public highways and other public outdoor areas in municipalities, governmental units and unincorporated communities where such service can be supplied from the existing general distribution system.

This schedule is also applicable within private property which is open to general public such as private walkways, streets and roads, when the property and buildings are under common ownership and when supply from the Company's distribution system is directly available and when lighting service is contracted for by the owner thereof.

Monthly Rate

Lamp Size		Overhead Supply		Underground Supply Metal Pole		Multiple Units For Each Additional Fixture Per Pole
Nominal Watts	Lumens	Wood Pole	Metal Pole	Low Mounting	High Mounting	
Mercury Vapor						
100	3,300	$ 4.45				$ 4.15
100	3,300			$ 5.80		
175	7,000			7.25		
175	7,000	4.85				4.50
250	10,000	6.95	$12.10		$12.10	6.50
400	20,000	8.60	13.65		13.65	8.05
High Pressure Sodium						
400	45,000	19.75	23.85		23.85	

All lamps are lighted from dusk to dawn every night, or for approximately 4,000 hours per annum. However, at the request of the Customer individual lamps may be operated continuously 24 hours per day. The monthly rate for each light continuously operated shall be the applicable rate above plus 60% of the applicable multiple unit monthly rate.

When the circuit length exceeds 150 feet per light there will be an additional monthly charge of $.007 per foot for each foot of span length and $0.010 per foot for each underground trench foot.

STREET AND HIGHWAY LIGHTING SERVICE

SCHEDULE "SL"

(Rate Code No. 370)

Availability

Available only for incandescent lighting installations served on June 1, 1974 for the lighting of public streets, public highways and other public outdoor areas in municipalities and unincorporated communities where service is supplied from the existing distribution system and where the Company owns and maintains all equipment. Service will be supplied from dusk to dawn each night.

Existing fixtures will not be replaced at the end of their useful life if replacements cannot be secured through normal supply channels. The Company will be the sole judge as to the end of the useful life.

Monthly Rate

	Size in Lumens (Nominal)				
Type	1,000	2,500	4,000	6,000	10,000
4' Bracket	$1.90	$2.90	$4.05	$5.10	
Mast Arm or Upsweep Bracket 6' and Over	2.00	3.10	4.15	5.20	
Center Suspension	2.15	3.20	4.25		
Ornamental or White Way (Wood poles—Overhead)			4.50	5.50	$7.85
White Way (Underground—See General)				6.35	

RULES AND REGULATIONS

Par. 4 (f) - - - Service poles for mobile homes will be supplied for a facility charge of $1.30 per month. - - -

APPENDIX B

PUBLIC SERVICE COMMISSION OF WEST VIRGINIA CHARLESTON

At a session of the PUBLIC SERVICE COMMISSION OF WEST VIRGINIA at the Capitol in the City of Charleston on the 25th day of April, 1977.

Case No. 8280

THE POTOMAC EDISON COMPANY,
a corporation.
In the matter of increased
rates and charges.

ORDER ON PETITION FOR REHEARING, REARGUMENT AND RECONSIDERATION OF COMMISSION'S ORDER OF APRIL 5, 1977

The respondent, The Potomac Edison Company of West Virginia, a corporation ("Potomac"), filed a petition on April 15, 1977 pursuant to Rule 19 of the Commission's Rules of Practice and Procedure, to reopen this proceeding for rehearing, reargument and reconsideration of the order of the Commission dated April 5, 1977, and assigned certain grounds therefor.

Upon consideration of said petition and the order of April 5, 1977, the Commission finds that certain clarification of its holdings, and reasons for the same, should be appropriate wherein it passed upon the following issues that have been raised in Potomac's petition:

(1) Effect upon Financing Necessary Construction; (2) Failure to Permit Respondent to Normalize Deferred Taxes; (3) Treatement of Rate Case Expenses; (7) Treat-

ment of Cash Working Capital; (9) Respondent's Rate "C-A"; and (14) Refund.

1. The Commission Did Not Fail to Consider Adequately the Effect of its Order on Respondent's Ability to Finance Necessary Construction.

The Respondent contends that the Commission's order did not adequately consider the Company's ability to finance necessary construction. This is not supported by the record in this case or by data supplied by the Potomac Edison Company with its petition for reconsideration. The Commission has found that rates granted will provide a reasonable rate of return, and evidence did not show the Company to be in a position of having an inability to finance necessary construction.

Potomac's figures (Schedule 1, although unsubstantiated and of no evidentiary value) show that the Commission's allowed rates gave adequate interest coverage in 1976. The Commission has not accepted and does not accept the proposition that the calculation of an interest coverage ratio and the resulting revenues requirement is a replacement for sound regulatory discretion. The revenue requirement to maintain any coverage ratio is greatly affected by changes in capital structure elemental components. The determination of what capital structure is appropriate for a utility has historically been left to management, and the Commission does not understand the Respondent as recommending otherwise. Therefore, we cannot accept the maintenance of a coverage ratio as a governing factor in ratemaking. The Company's own projections into 1977 (Schedule II, although unsubstantiated and of no evidentiary value) indicate that the capital requirements of $21,540,000 can be financed by internally generated funds of $3,490,000 and $18,050,000 of external financing under the Commission ordered rates.

2. The Commission Did Not Err in Failing to Permit Respondent to Normalize Deferred Taxes, in This Case.

Rates should reflect only the necessary expenses actually incurred by the utility currently. By normalizing deferred taxes, the Commission would be accepting an hypothetical tax allowance which would be higher than Respondent's actual tax obligation.

The Commission believes that as long as rate base continues to grow or remains stable, normalization will always mean higher rates than flow through, both presently and in the future. The Commission fails to see the equity and justness of approving an accounting method which has the effect of requiring unwarranted contributions of capital by ratepayers.

The record is void of any proof that normalized deferred tax is sufficient to create any tax advantage when the time value of money is considered from the ratepayers viewpoint.

The Commission is further concerned with the fact that it is practically impossible to ensure that the alleged tax saving will be used for capital expansion or prohibit the savings from being paid out to stockholders in the form of dividends.

However, we continue to adhere to our statements on page eight of our order herein dated April 5, 1976, to the effect that we are free to allow "normalization" of tax benefits, rather than "flow through", in any pending or future rate case depending upon the circumstances surrounding the Company being regulated and the record made in each particular case.

3. The Commission Did Not Err in its Treatment of Rate Case Expenses

The Commission may have erred in accepting the Respondent's revised estimate of rate case expense from $46,000 to $86,000 without requiring details. Therefore, the Commission directs the Respondent to submit in its next rate case filed with this Commission, a detailed schedule of its rate case expenses, both past and present, that it is utilizing to arrive at a going-level rate case expense.

7. The Commission Did Not Err in its Treatment of the Cash Working Capital Adjustment

Perhaps the Commission has been too lenient in allowing Respondent the use of a one-seventh method to arrive at a rate base working capital allowance. It is the burden of the Respondent to prove that *any* amount of cash working capital is required. The Respondent did not do so in this case, rather it is expecting the Commission to prove its case. The Commission is seriously considering requiring the Repondent to file a lead-lag study with its next rate case filing.

9. The Commission Did Not Err in Prohibiting the Phasing Out of Respondent's Rate "C-A" Without Permitting an Appropriate Adjustment to Test Year Revenues.

Investigation by Staff reveals that Respondent failed to follow Rule 16 of the Rules and Regulations for the Government of the Construction and Filing of Tariffs of Public Utilities as to the phasing out of Rate Schedule "C-A".

10. The Commission's Required Method of Refund is Proper.

With regard to the making of refunds, the Company is to have the right to apply any refund amount to a delinquent customer's balance, however, it should not treat a customer's account as being delinquent before the refund credit has been applied to his account.

The other items set out in Respondent's petition for rehearing, reargument and reconsideration were all taken into consideration by the Commission in reaching its decision in the order of April 5, 1977, and IT IS, THEREFORE ORDERED, that the order of April 5, 1977, except as amended and clarified herein, shall remain in full force and effect, and that Respondent's petition for rehearing, reargument and reconsideration is hereby denied.

A COPY.

TESTE:

S. GROVER SMITH, JR.,
Secretary

APPENDIX C

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 12th day of September, 1977, the following order was made and entered, to-wit:

The Potomac Edison Company, a corporation

vs.

Public Service Commission of West Virginia

Upon an appeal from, suspension and review of the final orders of the Public Service Commission of West Virginia made and entered on April 5 and April 25, 1977.

The Court, having maturely considered the petition, note of argument in support thereof, joint supplemental note of argument in support thereof; the record consisting of all papers, documents and evidence which were before the Public Service Commission at the hearing which resulted in the entry of the final orders complained of; the statement of reasons for the entry of its orders of the 5th and 25th days of April, 1977, filed herein by the respondent, Public Service Commission of West Virginia, on July 11, 1977; and the oral argument of counsel on the 12th day of July, 1977, the date fixed by the Court for hearing upon the aforesaid petition; is of opinion that the petitioner has not shown itself entitled to the relief prayed for in its said petition. It is therefore considered and ordered that the prayer of the petition for an appeal from, suspension and review, in this proceeding, be, and the same is hereby denied.

It is further ordered that leave be, and the same is hereby granted to the Public Service Commission of West

Virginia to withdraw from the office of the Clerk of this Court the record consisting of all papers, documents and evidence originally filed with the Public Service Commission of West Virginia. Justice Harshbarger absent.

A True Copy

Attest:

Clerk Supreme Court of
Appeals

APPENDIX D

[¶ 36,675] Statement of Policy Regarding First Mortgage Bonds Subject to the Public Utility Holding Company Act of 1935

Release No. 35-13105, February 16, 1956, 21 F. R. 1286.

Reg. § 251.13105. The Securities and Exchange Commission in acting upon applications under Section 6(b) and declarations under Section 7 of the Public Utility Holding Company Act of 1935 filed in respect of issues of first mortgage bonds of public-utility companies has required issuers to include in indentures various protective provisions.

[¶ 36,676] [Standards]

There has not heretofore been published by the Commission any rule or definitive statement of policy setting forth the standards against which it judges the adequacy of proposed indenture provisions. The Commission believes that such a statement would be in the public interest, and accordingly has formulated the standards set forth herein. The Commission will compare indentures submitted by issuers with these standards in considering (1) whether to impose terms and conditions in granting applications filed under Section 6(b) or (2) whether to make adverse findings in respect of declarations pursuant to Section 7(d). Where the Commission finds that a particular standard should be compiled with, but it is impracticable to include such standard in the indenture, the Commission will impose the standard as a condition in the Commission's order.

[¶ 36,677] [Deviations]

The Commission realizes that deviations from these standards should be permitted in appropriate cases. It also realizes that in most cases securities subject to Sections 6 and 7 of the Act will be issued under existing indentures and that to require issuers to conform existing indentures to such standards would in some cases produce harsh results and in other cases add needless complexity to the issuer's problem of complying in respect of several series of bonds with varying provisions relating to the same subject matter. The Commission is mindful of the fact that most securities presently outstanding under such existing indentures were issued after the examination of the indenture by the staff of the Commission and in many cases after the making of changes therein on recommendation of the staff or the Commission. Moreover, substantial amounts of such securities were purchased by and are held by experienced investors and such securities enjoy favorable ratings in the public markets.

[¶ 36,678] [Additional Securities]

The Commission therefore has determined that in most cases it would not be inconsistent with protection of the public interest and the interest of investors and consumers to permit the issue of additional securities under an existing indenture if (1) the Commission has heretofore permitted a declaration for the issuance of securities under such indenture to become effective under Section 7 or has heretofore granted an exemption with respect thereto under Section 6(b) and (2) the additional securities will be subject to substantially the same protective

provisions as the most recently issued outstanding securities of the issuer. However, the Commission may suggest changes in an existing indenture to comply with one or more of the proposed standards if by reason of changed or unusual circumstances the probable results of applying the provisions of the existing indenture would in the Commission's opinion require the making of adverse findings under Section 7(d) or the imposition as a condition to granting an exemption under Section 6(b) of a requirement that such changes be made. Moreover, since each supplemental indenture in respect of an additional series of bonds usually involves the restriction of additional surplus, all indenture provisions dealing with that subject will be examined for substantial conformity with the standards hereinafter prescribed. As indicated in the standards, the Commission may permit the amount of earned surplus remaining unrestricted to be larger than one year's dividend requirements on preferred and common stocks if the issuer demonstrates to the Commission that the payment of such larger amount to the common stockholders would not materially and adversely affect existing capitalization ratios or otherwise be inconsistent with the protection of the holders of the securities in the light of the ratio of mortgage debt to net fixed property.

[¶ 36,679] [Property Additions]

The Commission is interested in ascertaining whether the amount to be expended annually for property additions in compliance with the provisions of existing indentures is a reasonable annual requirement in relation to the book cost and estimated useful life of depreciable mortgaged property. In connection with declarations or applications in respect of additional bonds, the Commission will not, prior to July 1, 1956, require changes in existing clauses relating to renewal and replacement of mortgaged property. Thereafter the Commission will require a showing, on the basis of studies by the issuer, that the existing provisions for renewal and replacement are substantially equivalent to or greater than such amount as would reasonably be required under the standards hereinafter set forth for new indentures.

Neither the renewal and replacement fund requirements nor the sinking and improvement fund requirements, as set forth in this Statement of Policy, will be required to be applied retroactively.

[¶ 36,680] FIRST MORTGAGE BOND INDENTURE PROVISIONS

The Indenture as supplemented (the Indenture) of the issuer (the Obligor) of the bonds to be authenticated and delivered under the Indenture shall provide that the bonds can be called by the Obligor for redemption at any time upon reasonable notice and with reasonable redemption premiums, if any.

The Indenture shall contain provisions which shall not be less favorable to the holders of the bonds than the following:

[¶ 36,681] Issuance of Additional Bonds

(a) Additional bonds may be authenticated and delivered under the Indenture in a principal amount not in excess of

(1) a like amount of cash deposited with the Indenture Trustee;

(2) a like principal amount of retired bonds; or

(3) sixty per centum (60%) of the bondable value of net property additions;

provided that net earnings available for the payment of interest during any twelve (12) consecutive calendar months during the period of fifteen (15) calendar months immediately preceding the first day of the month in which application is made to the Indenture Trustee for the authentication and delivery of such additional bonds shall be at least equal to twice the annual interest requirements on all bonds authenticated and delivered under the Indenture and prior lien obligations which will be outstanding immediately after the authentication and delivery of such additional bonds. Notwithstanding any of the foregoing, no earnings test need be met if such additional bonds are to be authenticated and delivered solely for the purpose of refunding an outstanding series of bonds issued under the Indenture or prior lien

[¶ 36,681] **Reg. § 251.13105**—Continued

obligations, bearing a higher interest rate than such additional bonds, or for refunding an outstanding series of bonds issued under the Indenture or prior lien obligations within two years of maturity.

[¶ 36,682] **Sinking and Improvement Fund**

(b) The Indenture shall have the effect of requiring the Obligor to deposit annually with the Indenture Trustee an amount of cash equal to not less than one per centum (1%) of the aggregate principal amount of bonds of all series authenticated and delivered under to Indenture. Such requirement may, at the option of the Obligor, be stated separately for each series of bonds or be stated on an omnibus basis for all series.

(c) In determining the aggregate principal amount of bonds of all series authenticated and delivered under the Indenture, there may be excluded

(1) a series of bonds which has been retired, if the sinking and improvement fund with respect thereto was operative only so long as such series was outstanding;

(2) in all other cases, bonds authenticated and delivered under the Indenture on the basis of retired bonds;

(3) bonds authenticated and delivered under the Indenture which have been redeemed or purchased by the application of moneys deposited with the Indenture Trustee in connection with releases of property or on account of the damage or destruction of property; and

(4) bonds authenticated and delivered under the Indenture which have been pledged to secure indebtedness of the Obligor but which have not otherwise been issued to the public.

(d) In lieu of cash, the Obligor at its option may apply against the sinking fund requirement an amount equal to

(1) the principal amount of retired bonds; or

(2) sixty per centum (60%) of the bondable value of net property additions.

(e) The Obligor shall be required to meet its initial obligation under the sinking and improvement fund relating to the series of bonds to be authenticated and delivered under the Indenture not later than twenty-three (23) months from the date of said series of bonds.

[¶ 36,683] **Renewal and Replacement Fund**

(f) The Obligor shall expend annually for property additions an amount which the Obligor has demonstrated to the Commission is a reasonable annual requirement for the replacement of the book cost of depreciable mortgaged property of the Obligor which amount shall be expressed in terms of a percentage of said book cost. Such annual expenditure requirement may be satisfied, in whole or in part, by expenditures for property additions made in a previous period.

(g) If the Obligor shall have failed to satisfy such annual expenditure requirement, the Obligor shall deposit cash with the Indenture Trustee to the extent of such deficiency; provided, however, that the amount of cash required to be deposited may be reduced by an amount equal to the principal amount of retired bonds.

[¶ 36,684] **Limitation on Dividends**

(h) The Obligor shall not*

(1) declare any dividends or make any distributions in respect of outstanding shares of its common stock (other than dividends in shares of its common stock); or

(2) purchase or otherwise acquire for value, either directly or indirectly through a subsidiary, any outstanding shares of its common stock otherwise than in exchange for or out of the proceeds from the sale of other shares of its common stock

if the total amount of such dividends, distributions, purchases and acquisitions (all of which are hereinafter in this paragraph embraced in the word "dividends"), together with all other such dividends subsequent to the date of the series of bonds to be authenticated and delivered under the Indenture, exceeds, without giving effect to any of such dividends, or to any net transfers from earned surplus to stated capital accounts, the sum of (i) the earned surplus accumulated since said date, (ii) an amount equal to approximately the current annual dividend payments on the outstanding shares of preferred stock and common stock of the Obligor (including any shares then proposed to be issued), and (iii) such additional amounts the payment of which the Obligor has demonstrated to the Commission would not materially and adversely affect existing capitalization ratios or otherwise be inconsistent with the protection of the holders of the securities of the Obligor in the light of the ratio of mortgage debt to net fixed property.

[¶ 36,685] **Property Additions Subject to a Prior Lien and Prior Lien Obligations**

(i) Property additions which are subject to a lien prior to the lien of the Indenture may be used by the Obligor for any purpose under the Indenture provided that there is deducted from the amount of such property additions an amount at least equal to 166⅔% of the principal amount of outstanding prior lien obligations secured by such prior lien and such other deductions

* [For modification of this policy, see ¶ 36,688. CCH.]

as may be required under the Indenture and provided, further, that if such property additions are used as the basis for the authentication and delivery of bonds under the Indenture or the withdrawal from the Indenture Trustee of cash made the basis for the authentication and delivery of bonds under the Indenture, there shall be deposited with the Indenture Trustee (unless the issuance and deposit thereof are invalid) a principal amount of prior lien obligations not theretofore issued under the prior lien instrument at least equal to the principal amount of such bonds or cash.

(j) From and after the date of acquisition by the Obligor of property additions subject to a prior lien, prior lien obligations may not be issued under the instrument establishing such prior lien except for the purpose of delivery to the Indenture Trustee.

(k) After deduction shall have been made as set forth in paragraph (i) above on account of any outstanding prior lien obligations, the Obligor may use such prior lien obligations, upon the deposit thereof with the Indenture Trustee or their payment, redemption or retirement for the same purposes under the Indenture and to the same extent that retired bonds may be used.

[¶ 36,686] **Definitions and Miscellaneous**

(l) The amount of property additions shall be the cost to the Obligor or the fair value to the Obligor, whichever is less, of gross property additions. The fair value may be determined either as of the date of acquisition or the date of certification to the Indenture Trustee, whichever is appropriate in the light of other provisions of the Indenture.

(m) The bondable value of net property additions shall be determined after excluding or deducting from the amount of property additions an amount of property additions equal to the greater of retirements (less credits for cash or other substitutions) or the amount required to be expended for property additions pursuant to the renewal and replacement fund.

(n) To the extent property additions, cash, bonds, retired bonds, prior lien obligations and other property have, under a particular provision of the Indenture, been made the basis of a credit or for action by the Indenture Trustee, they may not be made the basis of a credit or for action by the Indenture Trustee under another provision of the Indenture. The provisions of this paragraph are designed to prohibit duplication of credits but they are not intended to preclude, for example, the certification of property additions (to the extent not theretofore used as the basis of a credit or for action by the Indenture Trustee) for the release of property additions which were likewise not so used and the subsequent inclusion of the property additions so certified in the computation of the bondable value of net property additions.

(o) Bonds authenticated and delivered under the Indenture and prior lien obligations which in either case have been purchased or retired with moneys or other property constituting a part of the trust estate under the Indenture shall not be used by the Obligor for any purpose under the Indenture except as otherwise herein provided.

(p) Retired bonds shall mean bonds authenticated and delivered under the Indenture which have been paid at maturity or upon redemption or have been purchased or otherwise acquired, and have been surrendered to the

Indenture Trustee and cancelled or for which funds are held by the Indenture Trustee for any of such purposes; provided, however, that retired bonds shall not include bonds theretofore authenticated and delivered under the Indenture which have been retired with moneys or other property constituting part of the trust estate under the Indenture.

(q) The net earnings of the Obligor available for the payment of interest shall be the amount of income remaining after deducting from the gross operating revenues of the Obligor all operating expenses of the Obligor including depreciation and taxes (other than taxes based on income) and after adding or deducting, as the case may be, net non-operating income or loss. The amount of net non-operating income or loss to be taken into account shall not exceed ten per centum (10%) of the balance of income remaining before consideration of such net non-operating income or loss.

(r) Any amounts representing amortization of electric or gas plant acquisition adjustments charged to income or charged to earned surplus in lieu of income shall be deducted in the computation of earnings available for the payment of interest only to the extent that the current provision for depreciation with respect to depreciable property shall be insufficient to permit the write-off of depreciable property (together with amounts classified as plant acquisition adjustments) at the expiration of the estimated useful life thereof.

(s) If the renewal and replacement fund requirement shall exceed the amount required to be deducted on account of depreciation plus the amount, if any, required to be deducted in accordance with paragraph (r) above, such excess shall also be deducted in the computation of earnings available for the payment of interest.

(t) Earned surplus which has been restricted in respect of the payment of dividends on, or the making of distributions with respect to, or the acquisition of, outstanding shares of the common stock of the Obligor may be debited or credited in respect of items inherent in the enterprise at the date as of which such earned surplus was restricted and debited in respect of transfers to capital.

(u) For purposes of determining earned surplus accumulated after the date as of which earned surplus shall have been restricted, there shall be included as charges applicable to the period subsequent to such restriction date the dividends on the outstanding shares of the preferred stock of the Obligor accruing subsequent to said date and the amount, if any, by which the aggregate of the expenditures required to be made by the Obligor subsequent to said date for property additions pursuant to the renewal and replacement fund shall exceed the aggregate for said period of

(1) the provisions made on its books of account in respect of depreciation; and

(2) amounts representing write-off, amortization, or provision for reserves in respect of plant acquisition adjustments, whether accounted for through the income account or through the earned surplus account, to the extent that such amounts pertain to items not inherent in the enterprise prior to the date as of which earned surplus has been restricted.

(v) In appropriate cases, the provision of the Indenture may be drawn so as to permit the use of consolidated data in complying with the requirements of the Indenture.

[¶ 36,687] Trust Indenture Act Provisions

(w) None of the provisions of the Indenture shall be in contravention of provisions required to be included, pursuant to Sections 310 to 317 of the Trust Indenture Act of 1939, in indentures qualified under said Act.

[Release No. 35-13105, February 16, 1956, 21 F. R. 1286.]

[¶ 36,688] First Mortgage Bond Redemption Policies

Release No. 35-16369, May 8, 1969, 34 F. R. 9553.

17 CFR 251.16369. On November 20, 1968 the Securities and Exchange Commission published an invitation for comments (Release No. 35-16211) on the question of whether it should modify those provisions of its Statement of Policy Regarding First Mortgage Bonds Subject to the Public Utility Holding Company Act of 1935 (Release No. 35-13105) which heretofore have required that bonds issued and sold pursuant to the terms of Sections 6 and 7 of such Act ("Act") be redeemable at the option of the issuer "at any time upon reasonable notice and with quirement now contained in its Statement of Policy Regarding First Mortgage Bonds Subject to the Public Utility Holding Company Act of 1935 (Release No. 35-13105), so that issuers may include in the indentures securing new issues of mortgage bonds a provision prohibiting, for a period of not more than five years, the refunding of such bonds by the issuance of debt securities at lower interest costs.

Heretofore, the general redemption prices of first mortgage bonds have been considered reasonable, within the meaning of the Statement of Policy, whenever such general redemption prices commence, immediately following the issuance of such bonds, at an amount equal to the sum of the coupon rate plus the public offering price and decline each year thereafter by equal amounts to the principal amount at the beginning of the last year prior to maturity. No change in this policy is authorized. Therefore, when the five-year period of non-refundability authorized herein expires, the general redemption price at which the bonds may then be called will be the same as it would have been if there had been no restriction on refundability.

reasonable redemption premiums, if any." A number of persons have submitted comments.

The Commission has concluded that it is appropriate, in the public interest and in the interest of investors and consumers, to permit the issuers of first mortgage bonds subject to the Act to include a five-year refunding limitation in the terms and provisions of new issues of such bonds. Accordingly, pursuant to the provisions of Sections 6, 7 and 20 of the Act, the Commission has suspended the redemption re-

The modification of redemption policy herein authorized shall not apply to the redemption of first mortgage bonds for sinking fund, or to redemptions in connection with mergers, sales of properties, or for other corporate purposes.

The foregoing modification of redemption policy shall also be applicable to other long-term debt securities issued and sold pursuant to Sections 6 and 7 of the Act.

The Commission wishes to emphasize that it will continuously review the effects of its redemption policies, including specifically the foregoing modification, and based on experience with the modification make such adjustments in these policies as may from time to time be deemed appropriate, including a rescission of the present modification, an extension of the allowed five-year non-refunding period, or any other change experience would warrant.

The modification of policy as to refundability herein authorized shall become effective on May 8, 1969.

[Release No. 35-16369, May 8, 1969, 34 F. R. 9553.]

[¶ 36,691] Statement of Policy Regarding Preferred Stock Subject to the Public Utility Holding Company Act of 1935

Release No. 35-13106, February 16, 1956, 21 F. R. 1288.

17 CFR 251.13106. The Securities and Exchange Commission in acting upon applications under Section 6(b) and declarations under Section 7 of the Public Utility Holding Company Act of 1935 filed in respect of issues of preferred stock by public-utility companies has required issuers to include various protective provisions in charters, by-laws or related instruments (hereinafter referred to as "charters").

There has not heretofore been published by the Commission any rule or definitive statement of policy setting forth the standards against which the Commission judges the adequacy of such provisions. The Commission believes that such a statement would be in the public interest and accordingly has formulated the standards set forth herein. The Commission will compare charters submitted by issuers with these standards in considering (1) whether to impose terms and conditions in granting applications filed under Section 6(b) or (2) whether to make adverse findings in respect of declarations pursuant to Section 7(d). The Commission recognizes that deviations from these standards should be permitted in appropriate cases.

In many cases a new series of preferred stock will be issued under existing charter provisions which prescribe the rights, preferences and privileges of the class of stock of which the new series is a part. In such a case, if the existing charter provisions do not conform substantially to the standards set forth herein, and if the issuer should decide that it would be unduly inconvenient or impracticable to convene a meeting of its stockholders prior to the

issuance of the new series for the purpose of amending its charter to effect compliance with the standards, the Commission would expect to apply the standards by the imposition of a condition to that effect in its order permitting the issuer's declaration to become effective or granting its application for exemption. The condition would be drafted to operate only so long as the issuer's charter was not amended to comply with the standards. The Commission, however, would expect the issuer to present such an amendment to its stockholders for approval on the next date on which a meeting of stockholders was being held for any other purpose.

[¶ 36,692] PREFERRED STOCK CHARTER PROVISIONS

The charter of the issuer (the Corporation) of the preferred stock (meaning the class under consideration) shall provide that the dividends on such stock shall be cumulative, and that such stock can be called by the Corporation for redemption at any time upon reasonable notice and with reasonable redemption premiums, if any.*

The terms and provisions of the preferred stock shall not be less favorable to the holders thereof than the following:

* [For modification of this policy, see ¶ 36,702.
CCH.]

[¶ 36,693] **Rights of Holders of the Preferred Stock to Elect Directors**

(a) If and when dividends on any series of the preferred stock shall be in arrears in an amount equal to four full quarter-yearly payments or more per share, the holders of all series of the preferred stock voting together as a class shall be entitled to elect the smallest number of directors necessary to constitute a majority of the full board of directors until such time as all dividend arrears on the preferred stock shall have been paid or declared and set apart for payment.

(b) Whenever the right to elect directors shall have accrued to the holders of the preferred stock, the proper officers of the Corporation shall call a meeting for the election of directors, such meeting to be held not less than 45 days and not more than 90 days after the accrual of such right.

[¶ 36,694] **Issuance of Securities Representing Unsecured Debt**

(c) Without the consent of the holders of at least a majority of the total number of shares of the preferred stock outstanding, the Corporation may not issue or assume any unsecured notes, debentures or other securities representing unsecured debt (other than for the purpose of refunding or renewing outstanding unsecured securities issued or assumed by the Corporation resulting in equal or longer maturities or redeeming or otherwise retiring all outstanding shares of the preferred stock) if immediately after such issue or assumption (1) the total outstanding principal amount of all unsecured notes, debentures or other securities representing unsecured debt of the Corporation will thereby exceed 20% of the aggregate of all existing secured debt of the Corporation and the capital stock, premiums thereon, and surplus of the Corporation, as stated on its books, or (2) the total outstanding principal amount of all unsecured notes, debentures or other securities representing unsecured debt of the Corporation of maturities of less than 10 years will thereby exceed 10% of such aggregate.

(d) For the purposes of paragraph (c) above, the payment due upon the maturity of unsecured debt having an original single maturity in excess of 10 years or the payment due upon the final maturity of any unsecured serial debt which had original maturities in excess of 10 years shall not be regarded as unsecured debt of a maturity of less than 10 years until such payment shall be required to be made within 3 years.

[¶ 36,695] **Limitation on Junior Stock Dividends**

(e) The Corporation shall not declare any dividends or make any distributions in respect of outstanding shares of any stock (herein called junior stock) of the Corporation ranking junior to the preferred stock as to dividends or assets, other than dividends in shares of junior stock, or purchase or otherwise acquire for value any outstanding shares of junior stock (each such dividend, distribution, purchase or acquisition being herein called a junior stock dividend) in contravention of the following:

(1) If and so long as the junior stock equity at the end of the calendar month immediately preceding the date on which a dividend on the junior stock is declared is, or as a result of such dividend would become, less than 20% of total capitalization, the Corporation shall not declare such dividends in an amount which, together with all other dividends on the junior stock paid within the year ending with and including the date on which such dividend is payable, exceeds 50% of the net income of the Corporation available for dividends on the junior stock for the twelve full calendar months immediately preceding the calendar month in which such dividends are declared, except in an amount not exceeding the aggregate of dividends on the junior stock which under the restrictions set forth above in this subdivision (1) could have been, and have not been, declared; and

(2) If and so long as the junior stock equity at the end of the calendar month immediately preceding the date on which a dividend on junior stock is declared is, or as a result of such dividend would become, less than 25% but not less than 20% of total capitalization, the Corporation shall not declare dividends on the junior stock in an amount which, together with all other dividends on the junior stock paid within the year ending with and including the date on which such dividend is payable, exceeds 75% of the

[¶ 36,695] Reg. § 251.13106—Continued

net income of the Corporation available for dividends on the junior stock for the twelve full calendar months immediately preceding the calendar month in which such dividends are declared, except in an amount not exceeding the aggregate of dividends on the junior stock which under the restrictions set forth above in subdivision (1) and in this subdivision (2) could have been, and have not been, declared.

(f) As used herein, "junior stock equity" shall mean the aggregate of the par value of, or stated capital represented by, the outstanding shares of junior stock, all earned surplus, capital or paid-in surplus, and any premiums on the junior stock then carried on the books of the Corporation, less

(1) the excess, if any, of the aggregate amount payable on involuntary liquidation of the Corporation upon all outstanding shares of preferred stock of the Corporation of all classes over the sum of (i) the aggregate par or stated value of such shares and (ii) any premiums thereon;

(2) any amounts on the books of the Corporation known, or estimated if not known, to represent the excess, if any, of recorded value over original cost of used or useful utility plant; and

(3) any intangible items set forth on the asset side of the balance sheet of the Corporation as the result of accounting convention, such as unamortized debt discount and expense; provided, however, that no deductions shall be required to be made in respect of items referred to in subdivisions (2) and (3) of this paragraph (f) in cases in which such items are being amortized or are provided for, or are being provided for, by reserves.

(g) As used herein "total capitalization" shall mean the aggregate of

(1) the principal amount of all outstanding indebtedness of the Corporation maturing more than 12 months after the date of issue thereof; and

(2) the par value or stated capital represented by, and any premiums carried on the books of the Corporation in respect of, the outstanding shares of all classes of the capital stock of the Corporation, earned surplus, and capital paid-in surplus, less any amounts required to be deducted pursuant to subdivisions (2) and (3) of paragraph (f) above in the determination of junior stock equity.

[¶ 36,696] Merger or Consolidation

(h) Without the consent of the holders of at least a majority of the total number of shares of the preferred stock outstanding, the Corporation shall not merge or consolidate with or into any other corporation or sell or otherwise dispose of all or substantially all of its assets unless such merger, consolidation, sale or other disposition or the issuance or assumption of securities in the effectuation thereof shall have been ordered or approved under the Public Utility Holding Company Act of 1935.

[¶ 36,697] Alteration of Preferred Stock Provisions

(i) Without the consent of holders of at least two-thirds of the total number of shares of the preferred stock at the time outstanding, the Corporation shall not amend, alter, or repeal any of the rights, preferences or powers of the holders of the preferred stock so as to affect adversely any such rights, preferences or powers; provided, however, that if such amendment,

alteration or repeal affects adversely the rights, preferences or powers of one or more, but not all, series of preferred stock at the time outstanding, only the consent of the holders of at least two-thirds of the total number of outstanding shares of all series so affected shall be required; and provided, further, that an amendment to increase or decrease the authorized amount of preferred stock or to create or authorize, or increase or decrease the amount of, any class of stock ranking on a parity with the outstanding shares of the preferred stock as to dividends or assets shall not be deemed to affect adversely the rights, preferences or powers of the holders of the preferred stock or any series thereof.

[¶ 36,698] Issuance of Additional Preferred Stock

(j)(1) Without the consent of the holders of at least two-thirds of the total number of shares of the preferred stock outstanding, the Corporation shall not create or authorize any shares of any class of stock ranking prior to the preferred stock as to dividends or assets or issue any shares of any such prior ranking stock more than 12 months after the date as of which the Corporation was empowered to create or authorize such prior ranking stock.

(2) Without the consent of the holders of at least a majority of the total number of shares of the preferred stock outstanding, the Corporation shall not issue any additional shares, or reissue any reacquired shares, of preferred stock or of any other class of stock ranking on a parity with the outstanding shares of the preferred stock as to dividends or assets for any purpose other than to refinance an equal par amount or stated value of preferred stock or of stock ranking prior to or on a parity with the preferred stock as to dividends or assets at the time outstanding, unless

(i) the gross income of the Corporation (after all taxes including taxes based on income) for 12 consecutive calendar months within a period of 15 calendar months immediately preceding the calendar month of such issuance is equal to at least 1½ times the aggregate of the annual interest charges on indebtedness of the Corporation (excluding interest charges on indebtedness to be retired by the application of the proceeds from the issuance of such shares) and the annual dividend requirements on all preferred stock (including dividend requirements on any class of stock ranking prior to or on a parity with the shares to be issued, as to dividends or assets), which will be outstanding immediately after the issuance of such shares; and

(ii) the aggregate of the junior stock equity is at least equal to the aggregate amount payable in connection with an involuntary liquidation of the Corporation with respect to all shares of the preferred stock and all shares of stock, if any, ranking prior thereto or on a parity therewith as to dividends or assets, which will be outstanding immediately after the issuance of such shares of preferred stock or stock ranking on a parity therewith.

(k) If for the purposes of meeting the requirements of clause (ii) of subdivision (2) of paragraph (j) above, it shall have been necessary to take into consideration any earned surplus of the Corporation, the Corporation shall not thereafter pay any dividends on or make any distributions in respect of, or purchase or otherwise acquire for value, junior stock which would result in reducing the junior stock equity to an amount less than the amount payable on involuntary liquidation of the Corporation with respect to all shares of the preferred stock and all shares ranking prior to or on a parity with the preferred stock as to dividends or assets, at the time outstanding.

[The next page is 26,637-3.]

(l) If, during the period as of which gross income is to be determined for the purpose set forth in paragraph (j) above, the amount, if any, required to be expended by the Corporation for property additions pursuant to a renewal and replacement fund or similar fund established under its mortgage indenture shall exceed the amount deducted in the determination of such gross income on account of depreciation and amortization of electric or gas plant acquisition adjustments, such excess shall also be deducted in determining such gross income.

[¶ 36,699] Acquisition or Redemption of Preferred Stock

(m) Should the Corporation be in arrears with respect to dividends on the preferred stock it shall not acquire any shares of the preferred stock (except by redemption of all shares of the preferred stock) unless approval is obtained under the Public Utility Holding Company Act of 1935.

[¶ 36,700] Voluntary Liquidation Preference

(n) The amount payable upon voluntary liquidation of the Corporation to the holder of each share of the preferred stock shall be equal to the then current redemption price of such share.

[¶ 36,701] Miscellaneous

(o) In appropriate cases, the provisions of the charter may be so drawn as to permit the use of consolidated data in complying with the requirements of the charter.

(p) No share of preferred stock shall be "outstanding" within the meaning of paragraphs (c), (h), (i) and (j) hereof if, at or prior to the time when the consent therein referred to would otherwise be required, provision shall be made for its redemption.

[Release No. 35-13106, February 16, 1956, 21 F. R. 1288.]

[¶ 36,702] Adoption of Modification of Policy Regarding Redemption Provisions of Preferred Stocks Issued and Sold Under the Public Utility Holding Company Act of 1935

Release No. 35-16758, June 22, 1970, 35 F. R. 10585.

17 CFR 251.16758. On April 20, 1970 the Securities and Exchange Commission published an invitation for comments (Release No. 35-16685) on the question of whether it should modify those provisions of its Statement of Policy Regarding Preferred Stock Subject to the Public Utility Holding Company Act of 1935 ("Act") (Release No. 35-13106) which heretofore have required that preferred stocks issued and sold pursuant to the terms of Sections 6(b) and 7 of the Act be redeemable by the issuer "at any time upon reasonable notice and with reasonable redemption premiums, if any," A number of persons have submitted comments.

The Commission has concluded that it is appropriate, in the public interest and in the interest of investors and consumers, to permit the issuers of preferred stock subject to the Act to include a five-year refunding limitation in the terms and provisions of new issues of such securities. Accordingly, pursuant to the provisions of Sections 6(b), 7 and 20 of the Act, the Commission has suspended the redemption requirement now contained in its afore-

[¶ 36,702] 17 CFR 251.16758—Continued

said Statement of Policy Regarding Preferred Stock, so that issuers may include in the charters, by-laws or related instruments ("Charters") defining the rights, preferences and privileges of new issues of preferred stock a provision prohibiting, for a period of not more than five years, the refunding of such stock by the issuance of debt securities at lower interest costs or other preferred stocks at lower dividend costs.

Heretofore, the general redemption prices of preferred stocks have been considered reasonable, within the meaning of the Statement of Policy, whenever such general redemption prices do not exceed the sum of the initial public offering price plus (1) 100% of the annual dividend rate during the first five years, (2) 75% of the dividend rate in the second five years, (3) 50% of the dividend rate in the third five years, and (4) 25% of the annual dividend rate for the remainder of the life of the stock. In conformity with this formula, when the five-year period of non-refundability authorized herein expires, the general redemption price at which the preferred stock may then be called should be the same as it would have been if there had been no restriction on refundability.

The modification of redemption policy herein authorized shall not apply to the redemption of preferred stock upon voluntary liquidation, or to redemptions in connection with mergers, sales of properties, or for other corporate purposes. Upon the occurrence of any of these events, the redemption price of the preferred stock shall be the same as it would have been if no restriction on refundability had been authorized.

The Commission wishes to emphasize that it will continuously review the effects of its redemption policies, including specifically the foregoing modification, and based on experience with the modification make such adjustments in these policies as may from time to time be deemed appropriate, including a rescission of the present modification, an extension of the allowed five-year non-refunding period, or any other change experience would warrant.

The modification of policy as to refundability herein authorized shall become effective as to all preferred stocks sold on and after June 22, 1970.

[Release No. 35-16758, June 22, 1970, 35 F. R. 10585.]